U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 June 2003

CASE NO.: 2002-LHC-2245

OWCP NO.: 5-113875

In the Matter of:

BERNARD MANLEY,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY,
Employer.

Appearances:

Charlene Parker Brown, Esq.
For Claimant

Christopher Hedrick, Esq.
For Employer

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim filed by Bernard Manley ("Claimant") for benefits under the Longshore and Harbor Workers' Compensation Act ("the act"), as amended, 33 U.S.C. 901 et seq. Claimant seeks temporary total disability compensation for the period from March 31, 2002 through April 15, 2002 as a result of work-related carpal-tunnel syndrome (CTS). The only issue is whether compensation is foreclosed by the fact that Claimant did not file a claim for benefits within one year of the initial appearance of pain from his first episode of this syndrome.

A formal hearing was held before me in this case on March 3, 2003 in Newport News, Virginia, at which both parties were given a full opportunity to present evidence and argument as provided by law and regulations. At the hearing, Claimant offered exhibits CX 1-6; Newport News Shipbuilding and Dry Dock Company ("Employer" or "the shipyard") offered exhibits EX 1-3; and the parties jointly submitted stipulations designated exhibit JX 1. With the exception of exhibit CX 1-1, all of these were admitted into evidence.[1]

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties have stipulated to and I find as follows:

1. That an employer/employee relationship between the parties existed at all relevant times;

2. That the parties are covered by the act;

3. That the issue to be resolved is whether Claimant suffered a compensable injury to his right hand in 2002;

4. That Claimant filed a timely claim for compensation;

5. That Claimant filed a timely first report of injury and Employer filed a timely notice of controversion;

6. That Employer provided Claimant with medical services as required by 33 USC 907 (1994);

7. That, if the administrative law judge finds that Claimant suffered a compensable injury to his right hand on March 29, 2002, then Claimant

[1] The following abbreviations are used as citations to the record:

CX - Claimant's exhibits;
EX - Employer's exhibits;
JX - Joint exhibit; and
Tr. - Transcript of the hearing.

would be entitled to temporary total disability compensation for the period from March 31, 2002 through April 15, 2002;

8. That Claimant's average weekly wage at the time of his injury was $796.63, resulting in a compensation rate of $531.09.

(JX 1).

ISSUE

Is Claimant entitled to compensation for a two-week period of disability resulting from his 2002 episode of carpal tunnel syndrome (CTS) or is he foreclosed from recovery by his failure to have filed a claim following his initial episode of this condition in the year 2000?[2]

SUMMARY OF EVIDENCE

Claimant, who currently resides in Winston, North Carolina, has been employed at the shipyard for the past thirty-three years. He currently works in Department M31 as a sleever. Mr. Manley's department is responsible for manufacturing wire markings for individual cable wires. He also is responsible for making cable tags (Tr. 17).

Claimant injured his right hand in September of 2000. While he was pulling sleeving out of a machine, his hands began to hurt and swell, and he reported it to the shipyard clinic (Tr. 18). Subsequently, Dr. Stiles, his physician, diagnosed and treated him for CTS. Claimant was out of work for a number of weeks but returned to work under light-duty restrictions (Tr. 19). He has been working under the same light-duty restrictions since the 2000 incident (Tr. 19).

Many months later, on March 29, 2002, Mr. Manley was asked to perform a job that he was not used to performing (Tr. 20). On this day, he was working on a machine that did not have the ability to pull sleeves electronically. Hence, he had to pull the sleeves manually out of the machine (Tr. 21). Claimant pulled the sleeving for approximately three to four hours with his right hand and typed with his left (Tr. 20-1). As he was performing the job, he felt his right hand start to swell (Tr. 21). By the end of his work shift, he noticed that his fingers had become numb (Id.). Then he felt pain shooting through his fingers and hand (Id.).

[2] There is no evidence of record that Employer filed a timely notice of injury with the Department of Labor for either CTS episode (in 2000 or 2002). If Employer did not file such a notice pursuant to section 13 of the act, Claimant's failure to file a timely claim in 2000 would not bar his recovery. 20 CFR 702.205. However, I will not address this issue because the record contains no information on the subject.

Claimant had never experienced this type of pain before. He did not immediately go to the clinic because he had a scheduled appointment with Dr. Stiles in a few days (Id.). After seeing Dr. Stiles, Mr. Manley took the paperwork passing him out of work to his shipyard case manager, Woody Holmes, who advised him that he would not be receiving workers' compensation benefits for his injury (Tr. 22).

Claimant's 2002 injury was different from what he had experienced before. When he suffered the injury in September of 2000, he never experienced any type of electrical shock sensation. After the 2002 injury, he began to experience electrical shock sensations which ran from the tip of his fingers to his elbow (Tr. 25).

In addition, with the 2000 injury, Claimant had more problems with swelling and pain than he did with his 2002 episode. The 2002 episode seemed affiliated with the nerves. It felt like someone was running a low voltage of electricity through his hands (Tr. 27-8).

DISCUSSION

I. Exclusion of Dr. Stiles' Report

As stated above, at the hearing, I excluded Dr. Stiles' report (CX 1-1) on the grounds that it had not been disclosed to Employer at least twenty days prior to the hearing pursuant to paragraph B3 of the notice of hearing.[3] Indeed, Dr. Stiles' opinion letter was dated January 8, 2003, and Claimant's counsel had had it since January 9, 2003 but did not disclose it until ten minutes before the hearing began (Tr. 13). Ms. Brown, Claimant's counsel, explained that she had not intentionally withheld the document but had failed to disclose it out of fear that Employer's counsel, Mr. Hedrick, would not see it if it were sent during a time when he was on active military duty (January 5-17, 2003) (Tr. 12-13). I ruled that, even if this were a partial excuse (and I did not believe that it was), it would serve as an excuse only for the period of Mr. Hedrick's military service and not until March 3, 2003, the date of the hearing.[4] I affirm my previous order (Tr. 14) and confirm my exclusion of the evidence. See Burley v. Tidewater Temps Inc., 35 BRBS 185, 187

[3] The original notice of hearing in this case was issued on September 12, 2002, but, because the hearing, which had been set for December 17, 2002, was continued at Employer's request until March 3, 2003, a rescheduling order to that effect was issued on February 6, 2003.

[4] I do not doubt the bona fides of Ms. Brown's explanation. In fact, she is a relatively inexperienced lawyer. Even so, she should have complied with the notice of hearing, which she had apparently read and understood.

(2002) (report of physician properly excluded where the employer failed to observe the administrative law judge's disclosure deadline and where the report in question could easily have been disclosed in a timely fashion). However, for the reasons stated below, the above ruling is not, in my view, fatal to Claimant's case.

II. Compensability

The parties have framed the key issue in this case as whether Claimant's 2002 episode of carpal tunnel syndrome, which caused a two-week absence from work, constituted a "new" or "old" injury.[5] The real problem here is the statute of limitations in section 12 (a) of the act, which requires a claimant to file a claim within one year of an injury. Claimant filed no claim within one year of the first episode of carpal tunnel syndrome in September of 2000 (Tr. 20). Therefore, by Employer's reasoning, if the 2002 episode can be causally related to his original CTS, any claim for compensation based on the 2002 episode would be barred by the statute of limitations.

The facts in this case are not seriously disputed. Mr. Manley's testimony as to what happened is unrebutted, undisputed, and largely confirmed by Dr. Stiles (CX 1-4, 1-5). On or about March 29, 2002, Claimant was asked to perform a job outside the scope of his restrictions involving strenuous sleeve pulling (Tr. 24). As a result of performing this task, he had a unprecedentedly severe attack of CTS (Tr. 21-2, 25, 27-8). Previously, his CTS symptoms had been dorsal wrist pain and swelling (Tr. 27-8). This time, Claimant suffered what the described as a "low voltage electrical shock" (Tr. 25). As a result of this, Dr. Stiles took him out of work for about two weeks while he underwent therapy (Tr. 21).

The law in this area is fairly clear and well established. The crucial question is whether Claimant's condition is due to an aggravation, acceleration, or exacerbation of a pre-existing condition, in which case a new injury has been sustained, or whether the condition is a natural and unavoidable consequence of a previous work-related injury, in which case the employer "on the risk" for that injury is responsible for benefits. See Strachan Shipping Co. v. Nash, 782 F. 2d 513 (5th Cir. 1986); Abbott v. Dillingham Marine and Manufacturing Co., 698 F. 2d 1235 (9th Cir. 1982). A work-related aggravation of a pre-existing condition is an injury pursuant to section 2 (2) of the act. Preziosi v. Controlled Industries, 22 BRBS 468 (1989).

Therefore, the issue is whether Claimant's 2002 episode represents an aggravation of an already-existing injury or a natural progression of that already-existing injury. Although I am unaided by medical opinion evidence of record on this issue, it is clear to

[5] The section 20(a) presumption is inapplicable in this case because there is no dispute about the work relatedness of Claimant's CTS.

me that Claimant's credible undisputed testimony establishes that this is an aggravation and not a natural progression:

1. The 2002 injury occurred after Mr. Manley was asked to perform a strenuous pulling activity outside his restrictions. The symptoms described above (Tr. 27-8) occurred immediately after this took place;

2. Claimant's symptoms (which he compared to an electrical shock) were wholly new and unprecedented to him (Tr. 27-8);

3. There is no evidence that Claimant had missed any time at work because of his CTS since 2000, when he was out for some weeks undergoing physical therapy (Tr. 18). This time, however, he missed two weeks (Tr. 22-3). Claimant testified that, as a result of the 2002 episode, he "just couldn't work anymore... not with this hand" (Tr. 25).

4. There is no evidence that CTS is a progressive disease or that Claimant's new symptoms would have occurred anyway at the same or nearly the same time through normal wear and tear.

I understand that the underlying physiological condition (CTS) was the same as before, but the severity and nature of the symptoms were significantly different in 2002. It was the symptoms that disabled Claimant.[6]

Even if I were to find that Claimant's 2002 CTS episode was a natural progression of an already-existing condition, I would nevertheless grant benefits because Employer has shown no prejudice from Claimant's failure to file a claim in 2000. Under subsection 12(d) of the act, absence of prejudice is a defense to a possible section 12(a) bar for failure to file a timely claim. Further, the burden is on Employer to show any prejudice. Strachan Shipping Co. v. Davis, 571 F. 2d 968, 971 (5th Cir. 1978). Prejudice is established when the employer demonstrates that, due to the claimant's failure to file a timely written claim, it was unable to provide medical services or investigate the claim. Davis, supra.

Here, Employer has made no such demonstration. Claimant reported his 2000 injury to the shipyard clinic immediately (Tr. 18). The probable work-related origin of Claimant's CTS was made known to the shipyard in a report sent to Employer by Dr. Stiles and received by the shipyard on October 11, 2000 (EX 3aa). Thus, Employer quickly had all the information it needed to perform a timely investigation of Claimant's injury. As to medical services, Employer paid them (stipulation no. 6).

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[6] See by analogy Gooden v. Director, OWCP (Janich), 135 F. 3d 1066, 1069 (5th Cir. 1998) (It is erroneous to focus on the origins of the underlying condition rather than on the ultimate heart attack).

For the above-stated reasons, and because a) Claimant filed a timely claim for benefits within one year of the March 29, 2002 episode (stipulation no. 4), and because b) Claimant gave prompt notice of this episode to the shipyard (Tr. 23), I conclude that Claimant is entitled to the benefits that he seeks.

ORDER

It is hereby ORDERED as follows:

1. Employer shall pay Claimant temporary total disability compensation at a rate of $531.09 per week for the period from March 31, 2002 through April 15, 2002.

2. Interest at the treasury-bill rate specified in 28 U.S.C. 1961 in effect when this decision and order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date on which each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

3. Employer shall continue to furnish such reasonable, appropriate and necessary medical care for Claimant's work-related injury pursuant to section 7 of the act.

4. Within thirty (30) days of receipt of this decision and order, Claimant's attorney shall file a fully supported and fully itemized fee petition, serving a copy thereof on Employer's counsel, who shall then have ten (10) days to respond thereto.

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FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/lpr
Newport News, Virginia